Dico Tire, Inc. *and* United Steelworkers of America. Cases 10–CA–28843, 10–CA–29109, and 10–RC–14650

April 17, 2000

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On June 4, 1997, Administrative Law Judge Lawrence E. Cullen issued the attached decision. The Respondent filed exceptions, a supporting brief, and an affidavit. The General Counsel filed a motion to strike the Respondent's affidavit.[1] The Respondent filed a response to the General Counsel's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] as modified below and to adopt the recommended Order.

1. The Respondent excepts to the judge's finding that the discharge of Charles Long violated Section 8(a)(3) and (1) of the Act. The Respondent contends that Long simply quit his job in a fit of rage and that Long never sought to be rehired by the Respondent. Contrary to the Respondent and for the following reasons, we agree with the judge that Long was unlawfully discharged.

The judge found that the General Counsel established that the Respondent knew that Long was a union supporter, that it harbored animus against the Union and its supporters, and that these factors substantially motivated the Respondent's decision to terminate Long. The judge further found that the Respondent failed to carry its *Wright Line*[5] burden of proving that it would have terminated Long in the absence of his union activities.

Long's undisputed testimony was that when he showed up for work on September 28, 1995, he found out that his supervisor, Ronnie Maples, had reassigned him from his regular model 11 machine to a different, model 14, machine. Maples knew this other machine was lower than Long's regular machine and would cause him to work in a stooped position and thus aggravate his back problems.[6] This information was conveyed to Long by employee Scott Caldwell, another model 11 tire builder, who, as the judge found, was opposed to the Union and "who laughed and informed Long that Long was not going to like it as he had been assigned to Long's machine for the day." Long testified that when he confronted Maples as to why it was necessary to switch employee Caldwell to Long's regular machine from another one of identical type, Maples claimed it was for increased production and made disparaging remarks about Long's productivity.[7] The Respondent, however, failed to demonstrate how, if increased productivity was its goal, the reassignment could accomplish this goal. The record further reflects, and the judge found, that the Respondent's reassignment so provoked Long that it made him sick and led to his decision to leave work early. However, without waiting for any clarification as to Long's status, the Respondent declared that Long had quit and continued to maintain this position even after Long appeared for work at the beginning of his next scheduled workday.[8] The judge found that the Respondent seized on this incident to discharge Long and rid itself of a union supporter.

The Board has long held that, "an employer cannot provoke an employee by its unlawful conduct to a point where he commits an indiscretion and then rely on it to discipline the employee." *Paradise Post*, 297 NLRB 876 (1990), and cases there cited. This is especially relevant here where, as the judge found, Long had an unblemished work record. Moreover, even if Long's decision to leave work early that day had not been provoked by the

[1] In light of our disposition of this case, we find it unnecessary to pass on the General Counsel's motion to strike the Respondent's affidavit. We note, however, that the affidavit does not support the Respondent's implication in its brief that any impropriety occurred during the settlement conferences in this proceeding.

[2] Contrary to the Respondent's contentions, we find that the amended complaint allegations are all closely related to the general legal theory and substance of the original charges, and therefore are not barred under Sec. 10(b) of the Act. See *Fiber Producers*, 314 NLRB 1169 (1994), enfd. sub nom. *FPC Holdings Inc. v. NLRB*, 64 F.3d 935, 938–942 (4th Cir. 1995); and *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 5 (1989).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by prohibiting employee Kyle Mitchell from discussing his suspension and by requiring him to waive his statutory right to Board access or to the judge's dismissal of an 8(a)(3) allegation regarding Mitchell's suspension.

We also note that the judge's finding that the Respondent violated Sec. 8(a)(1) by prohibiting employees' distribution of union literature in its parking lots was based solely on the Sec. 7 rights of the Respondent's employees. The judge did not rely on any impact that this prohibition may have had on union representatives who were also present.

We also agree with the judge's overall finding that the Respondent engaged in disparate treatment of Faye Rainey when she was directed to remove her bag of union literature from the disconnect switch on her machine and to put it in her locker. We rely on the fact that other employees were allowed to keep personal belongings on levers located on the base of their machines, but Rainey was not offered this option.

[5] 251 NLRB 1083 (1980).

[6] Long's testimony regarding his back condition is supported by Maples' admission that he had seen Long wearing a back brace.

[7] The judge noted that Long had never received any disciplinary action for poor production since becoming a permanent employee in 1990.

[8] The Respondent does not contend that it discharged Long as a matter of discipline for leaving work without permission, but only claims that it was justified in treating him as an employee who had quit.

Respondent's unlawful conduct, we would find that the Respondent has failed to carry its *Wright Line* burden of demonstrating that even in the absence of his union activities it would have treated him as having quit. The record shows that other employees, including employees Farr and Douglas, left work without telling anyone and were not treated as having quit their jobs,[9] whereas Long was discharged even though he did report that he was leaving.[10] We find that this evidence that Long was treated disparately by the Respondent further supports the judge's conclusion that Long was terminated for discriminatory reasons.

2. The Respondent also excepts to the judge's finding that Larry Pitts was a supervisor and, therefore, that it violated Section 8(a)(1) when he threatened employee Herschel Sanders and other maintenance employees by telling them that they would be replaced by subcontractors because of their union sentiments. The Respondent contends that during the period in question Pitts did not exercise independent judgment in connection with his duties and did not possess any of the indicia of supervisory status specified in Section 2(11) of the Act. We find merit in the Respondent's exceptions. Contrary to the judge, and for the reasons stated below, we find that the General Counsel did not meet its burden of establishing that Pitts was a supervisor within the meaning of Section 2(11).

Pitts did not testify at the hearing and the record does not establish what specific job Pitts held, other than that it was in the Respondent's maintenance department. As the party asserting supervisory status, the General Counsel has the burden of establishing that at the time the alleged violations took place, Pitts possessed at least one of the types of authority specified in Section 2(11), an indication of supervisory status, and that this authority was exercised with independent judgment on behalf of management and not in a routine manner.[11] The only evidence put forward by the General Counsel in support of his claim that Pitts was a supervisor consisted of two 1-day vacation request forms approved by Pitts[12] and limited testimony from two employees to the effect that Pitts was the person to whom they complained about working conditions and reported when they were going to be absent, and that Pitts scheduled overtime, vacations, and absences. Contrary to the judge, we find that evidence to be insufficient to establish that Pitts was a statutory supervisor.

The mere fact that employees may have complained to Pitts about working conditions is not an indicium of supervisory status, since there is no evidence that Pitts was empowered to act on behalf of management in resolving such complaints. Neither is it significant that employees may have reported to Pitts when they were going to be absent, since the receipt of such reports in and of itself is no more than a clerical function. The scheduling of overtime, vacations, and absences may be a supervisory function if it involves the use of independent judgment. However, if such tasks are carried out within relatively fixed parameters established by management, then their performance is routine and does not indicate supervisory status. *Azusa Ranch Market*, 321 NLRB 811 (1996); *Quadrex Environmental Co*., 308 NLRB 101 (1992).

Here, there is no evidence in the record to indicate that Pitts exercised independent judgment in performing any of his allegedly supervisory functions. No evidence was submitted regarding the circumstances under which Pitts signed the vacation approvals. Thus, it has not been established that Pitts possessed any discretion to refuse to sign the forms if the requested vacation dates were within established parameters. Neither is there evidence that Pitts exercised independent judgment with regard to the scheduling of other absences or overtime. We therefore find that the General Counsel has failed to meet his burden of establishing that Pitts possessed or exercised supervisory authority as defined in Section 2(11) of the Act. Accordingly, we reverse the judge's 8(a)(1) findings regarding threats made by Pitts, and we dismiss this allegation of the complaint.[13]

3. Finally, the judge found that the Respondent violated Section 8(a)(1) by threatening loss of jobs if the Union were elected. In finding this violation, the judge relied on the testimony of employee Dennis Snyder that Tire Room Superintendent Terry Phillips had made such a threat to him. The Respondent excepts, contending that in finding that violation the judge improperly relied on evidence that was introduced by the General Counsel merely for background purposes and not to establish an independent violation. The record shows, however, that the testimony which the General Counsel characterized as "background" was not Snyder's testimony about Phillips' statement to him. Rather, when, during cross-examination, the Respondent's attorney asked Snyder, "Did you distribute handbills and Union literature," the General Counsel objected, stating that the matter into which the question inquired was beyond the scope of the direct examination and had been "used as a background animus." After the General Counsel reiterated, in response to a question from the judge that the matter had been "used as background," the judge overruled the objection on the basis that the General Counsel had "in-

[9] Farr did not receive any discipline and Douglas was suspended for 2 days.

[10] The judge noted that Long told Mike Hohlman, his leadman, that he was leaving and that he reported for work 2 days later for his next regularlyscheduled shift.

[11] *Bowne of Houston*, 280 NLRB 1222, 1223 (1986).

[12] G.C.Exhs. 17 and 18.

[13] Although we have dismissed the 8(a)(1) allegation regarding Pitt's alleged threat that the Respondent would subcontract out work, the Order has not been modified because of our adoption of the judge's findings of similar violations committed by others whose Sec. 2(11) status is not challenged.

quired into it" on direct examination. In fact, on direct examination, Snyder had testified that he had been involved in the union campaign by handing out literature and talking to people and that his supervisors knew of his involvement because they had seen and heard him while he was engaging in these activities. It was following this testimony that Snyder testified about Phillips' statement to him, which the judge subsequently found to constitute an unlawful threat of job loss. Consequently, as it was Snyder's testimony about his union activities, rather than his testimony about Phillips' statement to him, that the General Counsel characterized as "background," we find no merit in the Respondent's contention that, in finding Phillips' statement unlawful, the judge relied on evidence that had been introduced solely for background purposes. Accordingly, we adopt the judge's finding that Phillips' statement violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dico Tire, Inc., Clinton, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED, that the election in Case 10–RC–14650 shall be set aside and this case is remanded to the Regional Director of Region 10 to conduct a new election at a time and place determined by him.

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting and concurring in part.

Contrary to my colleagues and the judge, I would not have permitted the General Counsel to amend the complaint to add an allegation that the Respondent unlawfully solicited grievances during the union campaign. This new allegation was not closely related to any timely allegation set forth in any charge.

In my dissent in *Ross Stores,* 329 NLRB 573 (1999), I said that I would adhere to the factors set forth in *Redd-I*, *Inc*., 290 NLRB 1115 (1988). Under *Redd-I* the Board examines three factors to determine whether an otherwise untimely allegation is closely related to a timely allegation. The Board first looks to see if the untimely allegation involves the same legal theory as a timely allegation. Second, the Board will look at whether the timely and untimely allegations arise from the same factual circumstances or sequences of events. Third, the Board will look at whether a respondent would raise similar defenses to the timely and untimely allegations.

As to the first factor, the theory of the allegation of soliciting grievances is substantially different from the theory of the timely allegations of threats and interrogations. The legal theory of an allegation concerning a solicitation of grievances is that the employer is impliedly promising to remedy the grievances, i.e., offering a "carrot" to employees if they will eschew the union. By contrast, the legal theory of allegations of threats and interrogation is that the employer will use a "stick" on employees who adhere to the union, and will ask questions to find out who these employees are.

As to the second element of *Redd-I,* the untimely allegation did not arise from the same factual circumstances as the timely allegation. The untimely allegation arose out of an employee meeting conducted by CEO Mori Taylor and CCO Michael R. Samide. These officials were not alleged to have engaged in any of the conduct set forth in the timely charges. Indeed, the complaint and amended complaint did not even name them as supervisors or agents who were involved in this case.

As to the third element of *Redd-I,* the defense concerning the untimely allegation would differ from those of the timely allegation. Since the two involve different incidents and different alleged perpetrators, it is clear that different "denial" witnesses would be called. Further, the defense concerning the allegation of solicitation of grievances would involve a showing that the Respondent's practice, even prior to the union campaign, was to ascertain sources of employee dissatisfaction. With respect to threats, the defenses would focus on the difference between threats and predictions.[1] With respect to interrogation, the defenses would involve the Board's test of "all the circumstances."[2]

Finally, even if the charge were timely in a 10(b) sense, I note that the General Counsel's motion to amend the complaint came at the very end of the trial. In order to allow time for defense preparation, it is far preferable for the General Counsel to amend the complaint before trial or, at least, prior to the conclusion of his case-in-chief.

I agree with my colleagues' adoption of the judge's finding that the Respondent's discharge of employee Charles Long violated Section 8(a)(3) of the Act. In so doing, I need not rely on *Paradise Post*, 297 NLRB 876 (1990). That is, I conclude that the Respondent discharged Long for his union activity rather than for his alleged misconduct. I therefore do not reach the issue of whether a discharge for misconduct would have been unlawful on the ground that the Respondent unlawfully provoked the misconduct.

Kerstin I. Meyers, Esq., for the General Counsel.
Douglas G. Olson, Esq. (McGhee, Olson, Whitmire, Olson & Pepping, LTD), of Silvis, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me on April 17, 18, and 19, 1996, in Knoxville, Tennessee. Case 10–CA–28843 is based

[1] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[2] *Rossmore House,* 269 NLRB 1176, 1177 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985).

on an amended charge filed by the United Steelworkers of America (the Charging Party, the Petitioner, or the Union) on December 18, 1995. A complaint in that case was filed by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on January 25, 1996. On February 2, 1996, an order directing hearing on objections and consolidating cases and notice of hearing was issued by the Regional Director and Case 10–CA–28843 was consolidated with objections filed in Case 10–RC–14650. Subsequently, a new charge was filed by the Union in Case 10–CA–29109 and an amended consolidated complaint and notice of hearing was issued by the Regional Director on March 18, 1996. The complaint is joined by the answer filed by Respondent on April 5, 1996, and subsequently amended. At the commencement of the hearing the General Counsel moved to amend the complaint to allege that the Respondent had discriminated against its employee Faye Rainey on October 13, 1995, by refusing to allow her to keep her personal belongings at her workplace on October 13, 1995, and the General Counsel moved to amend the complaint to change the name of the alleged discriminatee from Joyce Hood to Faye Rainey, which motions were taken under consideration by me following Respondent's objections to doing so. The complaint contains allegations that Respondent Dico Tire, Inc. (the Respondent or the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act. Objections were filed by the Union to an election held among employees in a stipulated unit of production and maintenance employees, on October 17 and 18, 1995. The objections allege that Respondent engaged in certain conduct during the critical laboratory period which interfered with the election.

On due consideration of the testimony of the witnesses and evidence received at the hearing and the positions of the parties at the hearing and the briefs filed by the General Counsel and by the Respondent, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits, and I find that at all times material Respondent has been an employer within the meaning of Section 2(6) and (7) of the Act engaged in the manufacture of tires in Clinton, Tennessee. The Respondent is a wholly owned subsidiary of Dyneer Corporation, which is a wholly owned subsidiary of Titan Wheel International.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material the United Steelworkers of America has been a labor organization within the meaning of Section 2(5) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES[1]

A. The Amendments to the Complaint

At the commencement of the hearing, the General Counsel and the Union moved to amend the amended complaint by amending paragraph 13 of the complaint to read "Since on or about October 13, 1995, the Respondent has discriminated against its employee Faye Rainey by refusing to allow her to keep personal belongings at her work station." Paragraph 13 of the amended complaint had previously read, "On or about October 13, 1995, Respondent refused to allow its employee Joyce Hood to keep certain belongings at her work area while not similarly restricting other employees." The General Counsel asserted at the hearing that this amendment was offered to correct a clerical error by substituting the name of Faye Rainey for that of Joyce Hood and that she had alerted Respondent by a facsimile letter a week prior to the hearing. Respondent objected to the amendment and asserted that Faye Rainey had filed an initial charge in this case and had the charge withdrawn and had not filed a subsequent charge as of the date of the hearing and that the charge was time barred by Section 10(b) of the Act, which provides a 6-month limitation on the filing of charges and that the charge could not be refiled as the Union and the General Counsel had not offered any basis that would support an extension of the 6-month period.

At the close of the hearing the General Counsel moved to amend the complaint "to include all issues that were litigated." When questioned by me as to what she was specifically moving to amend into the complaint, the General Counsel reasserted the substitution of Faye Rainey for Joyce Hood who is listed as the alleged discriminatee in paragraph 13 of the complaint. She went on to amend the complaint to add the "overly broad application of the no solicitation and no distribution rule." She also moved to add an allegation to include alleged "unlawful threats to sub-contract out work" by alleged Supervisor Pitts and alleged unlawful threats by Human Resources Manager Washington of reduction in pay if the employees selected the Union as their collective-bargaining representative. She also moved to add an alleged unlawful unspecified threat by Pitts in the third week of September to employee Hershel Sanders that he had better watch himself. The General Counsel also moved to amend the complaint by adding allegations that Mori Taylor and Michael Samide unlawfully solicited grievances and made promises of benefits at meetings held by them with the unit employees in August 1995. The Respondent objected to all the proposed amendments as time barred. I took all of these matters under advisement and directed the parties to address them in their briefs.

In her brief, the General Counsel contends that all the amendments are: (1) of the same class as the violations alleged in the complaint, (2) arise from the same or similar factual situation or sequence of events as the allegations contained in the pending complaint, and (3) are subject to the same or similar defenses, citing *Redd-I, Inc.*, 290 NLRB 1115 (1988), and contends further that the Board has recognized that where an allegation has been fully litigated at the hearing the Board will find a violation citing *Meisner Electric, Inc.*, 316 NLRB 597 (1995). The General Counsel contends that all the newly asserted allegations are closely related to the complaint allegations and have a factual and legal nexus to those in the complaint and that Respondent presented witnesses and cross-examined witnesses and did not request a continuance or extension of the hearing and that the issues were fully litigated, citing *Fiber Products,* 314 NLRB 1169 (1994). The General Counsel notes that some of the allegations vary slightly with those charged but asserts this is not fatal since Respondent was apprised of the allegations, which were fully litigated, citing *Opelika Welding*, 303 NLRB 1051 (1991). In his brief, Respondent's counsel has reasserted his objections to the amendments.

[1] The following includes a composite of the credited testimony of the witnesses.

After a review of the foregoing, I find that the amendments were closely related to the complaint allegations that Respondent was given sufficient opportunity to defend against these amended allegations and ably did so, and that these allegations were fully litigated at the hearing. I find the foregoing cases cited by the General Counsel support the propositions for which they have been offered and I grant each of the above amendments.

B. The 8(a)(1) Violations

1. The allegations concerning solicitation and distribution of literature on behalf of the Union

In January 1995, the Respondent promulgated a facially valid rule prohibiting solicitation during working time and distribution of literature in working areas during working times. *Our Way*, 268 NLRB 394 (1983). There was abundant evidence presented in this case that the rule was ignored by Respondent's management and that members of management, supervisors, and employees engaged in solicitation and distribution in working areas and on working time (i.e., unrebutted testimony of Kyle Mitchell regarding the sale of cookies and candy on company property during worktime and the distribution of a "ball board," a betting device used to bet on sporting events, and which supervisors participated in—see also the unrebutted testimony of employees Dennis Snyder and David Courtney and General Counsel's Exhibit 5a (the ball board). Until the advent of the union campaign in August 1995, there had been no enforcement of Respondent's no-solicitation, no-distribution rule. This changed, however, when employees began to solicit on behalf of the Union and to distribute union literature.

(a) Supervisor Maples' instructions to employees Cox and Long not to engage in union solicitation on company property

Employees Charles Cox and Charles Long testified that on August 16, 1995, they were summoned to the office of Supervisor Ronnie Maples who asked them whether they had been discussing the Union and told them they should not discuss the Union "on Company property." Long told Maples that the employees had a legal right to discuss the Union during breaks and nonpaid time. Maple told them that this was not correct but said he would "check on it." Maples never revisited the subject with these employees, leaving intact his pronouncement that the employees could not discuss the Union "on Company property," thus effectively promulgating an overly broad invalid rule against solicitation. Maples acknowledged having met with Cox and Long in his office but placed the meeting in September rather than August and testified that he had given them some "friendly advice" not to pass out literature during "company time." He testified he was told to issue this advice by his superintendent, Phil Harrison, who was not called as a witness.

Analysis

I credit Cox's and Long's testimony. I find that Maples' instruction issued to Cox and Long that they could not solicit on "company property" was a violation of Section 8(a)(1) of the Act as it constituted the promulgation of an unlawfully broad no-solicitation rule as it precluded solicitation during their own time rather than restricting solicitation only during worktime. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), rehearing denied 325 U.S. 894 (1945). See *Teksid Aluminum Foundry*, 311 NLRB 711, 714 (1993). Re: forbidding solicitation on "company property."

(b) Union literature distribution—Courtney

Employee David Courtney testified that on September 29, 1995, at approximately 5:30 p.m. he distributed union literature in the main break area while he was on his break. As he left the break area Supervisor Gary Walker approached and told him that he could not pass out the literature in the plant. Courtney told Walker that he had the legal right to pass out the literature during breaks. Walker then told Courtney that he "had to tell him that." Walker then asked for and received a "high five" from Courtney. Walker testified that he told Courtney who he had observed passing out literature, "David you know better" in which Courtney maintained he was on break and knew his rights to which Walker replied, "Okay." Walker testified at the hearing that he could have removed the literature from the breakroom, which was "company property."

Analysis

I credit Courtney's version, which is consistent and corroborated in part by Walker. I find that Walker's restriction on the passing out of union literature in the breakroom, a nonworking area, during Courtney's break was violative of Section 8(a)(1) of the Act. *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 113 (1956).

(c) Personnel Manager Bright's and Corporate Director of Human Resources Washington's orders to employees not to distribute union literature in the parking lot

On October 10 and 11, 1995, several employees engaged in handing out union literature in the parking lot near the guard shack as employees entered or left the premises. On both days they were ordered to leave Respondent's property in order to hand out the literature outside of the property. On October 10 Personnel Manager Mark Bright ordered them to leave Respondent's property and go across the railroad tracks outside the Respondent's property although there was a public easement between Respondent's property and the railroad tracks. On October 11 both Bright and Corporate Director of Human Resources Henry Washington ordered them to leave the parking lot in order to hand out the literature. The employees were not given any reason for their ejection from the parking lot.

Subsequently on October 13, 1995, while employee Joyce Hood was waiting in her car for another employee Bright approached her and asked what she was doing and told her she could not hand out union literature in the parking lot. Hood told Bright she was waiting for another employee, and Bright went back to the plant. Hood testified that both employees and nonemployees routinely waited in their vehicles for employees.

Analysis

I find Respondent violated Section 8(a)(1) of the Act by prohibiting the distribution of union literature in its parking lot as this was a nonworking area, *NLRB v. Babcock & Wilcox Co.*, supra; *Spring City Knitting*, 285 NLRB 426 fn. 4 (1987). As the General Counsel contends, requiring the employees to leave the parking lot in the absence of a bona fide business reason for doing so also created a nonaccess rule in violation of Section 8(a)(1) of the Act. *Tri-County Medical Center*, 222 NLRB 1089 (1976).

(d) Disparate enforcement of Respondent's facially valid no-solicitation/no-distribution rule

The record clearly establishes that solicitation of employees to buy candy, cookies, bet on ball boards, and the distribution and posting of fliers to sell items were regularly engaged in by employees, supervisors, and members of management and that Respondent's facially valid no-solicitation, no-distribution rule was ignored until the advent of the union campaign when a harsher overboard and illegal rule against discussion or distribution on behalf of the Union was disparately enforced by Respondent in order to stem the union campaign. This disparate enforcement of this rule only against union activities was violative of Section 8(a)(1) of the Act. *Emergency One, Inc.*, 306 NLRB 800 (1992); *Dayton Hudson Corp.,* 316 NLRB 477 (1995).

2. Allegations of interrogation and threats

(a) Interrogation of employees Winegardner and White and threats issued to them by Tire Room Superintendent Terry Phillips

Employee Mark Winegardner testified that approximately September 28, 1995, he was training employee Chris White on the model II tire building machine and they were approached by Tire Room Superintendent Terry Phillips. Phillips initially spoke to the two employees arguing against the Union. He then asked them if they knew who was distributing the union authorization cards and expressed the desire that those responsible would reveal themselves so management would know their identities. Both employees denied knowledge of who was behind the Union's efforts but White told Phillips he supported the Union. Phillips testified that White had questioned him concerning his sentiments toward the Union and that Phillips told White, he did not have "feelings either way." Prior to this, neither Weingardner nor White had been open union supporters.

Analysis

I credit the testimony of Winegardner over that of Phillips who testified that White had asked him his union sentiments, which testimony of Phillips I find unlikely. I find that Phillips' interrogation of Winegardner and White was clearly coercive and intimidatory in violation of Section 8(a)(1) of the Act.

(b) Threats to subcontract and reduce wages

Winegardner testified further that in the September 28 incident involving Phillips that Phillips also told him and White that if the employees chose union representation in the upcoming election that wages would be negotiated from the bottom up and would drop to between $6 and $7 an hour. In this same conversation, Phillips also said that if the employees selected the Union the maintenance work would be subcontracted out.

Analysis

I credit Weingardner and find that Phillips did threaten White and Weingardner with a reduction in wages and the subcontracting out of maintenance work if the employees chose union representation in the upcoming election and Respondent thereby violated Section 8(a)(1) of the Act.

(c) Interrogation of employee Dennis Snyder and threats issued to him by Tire Room Superintendent Phillips

Employee Dennis Snyder testified that approximately September 21, 1995, Phillips approached him at his machine and asked why he supported the Union and Phillips then told him that if the employees selected the union the employees would lose jobs and benefits would be lost. Phillips admitted that this conversation took place, but testified he had approached Snyder after having seen union literature in his pocket and asked him why he supported the Union and asked if Snyder was not afraid he could lose something in negotiations and told Snyder to get a guarantee in writing from the Union.

Analysis

I credit Snyder's version of this conversation rather than the version put forward by Phillips. The Respondent makes much of Snyder's change in his testimony from September 21 to 25, 1995, as the date of this conversation. I credit Snyder that the correct date was September 25 and do not regard this difference in the date as detrimental to the overall credibility of Snyder. Moreover, Phillips did not deny this conversation took place, but placed a different context on it by tying his prediction of loss of benefits and pay to the negotiation process. I find that Phillips' threat issued to Snyder that the employees would lose jobs and benefits if the Union were selected was coercive and violative of Section 8(a)(1) of the Act.

(d) Threats of subcontracting and loss of jobs issued to employees Sanders and Sexton by Supervisor Larry Pitts

Employee Herschel Sanders, a maintenance employee, testified that approximately September 21, 1995, he was working in the machine shop with employee Donny Sexton and that Maintenance Supervisor Larry Pitts approached and told Sanders that if he "didn't knock it off with the Union business" they would "be replaced." Pitts said further that the maintenance employees would be replaced by Daniels employees, a maintenance contractor named Fluor Daniels that had until 1990 performed maintenance work at this facility. Pitts did not deny making these statements.

Respondent contends Pitts was not a supervisor in September 1995. However, evidence presented at the hearing showed that maintenance employees reported absences to Pitts, complained about working conditions to him, and that he scheduled overtime, vacations and absences. General Counsel's Exhibits 17 and 18 are 1-day vacation requests approved by Pitts in September and October 1995. I find Pitts was a supervisor within the meaning of Section 2(11) of the Act.

Analysis

I credit Sanders' unrebutted testimony and find that Pitts did threaten that the jobs of the maintenance employees would be subcontracted out and they would lose their jobs if the employees chose union representation and that Respondent thereby violated Section 8(a)(1) of the Act.

(e) Threat of reduction in wages and subcontracting issued to employee James Braden by Corporate Director of Human Relations Henry Washington

I also credit the unrebutted testimony of employee James Braden that in early October 1995 Corporate Director of Human Relations Washington answered in the affirmative an inquiry as to whether Warehouse employees wages would be reduced if the Union were successful thus linking this loss to the employees selection of the Union as their collective-bargaining representative and that Respondent thereby also violated Section 8(a)(1) of the Act.

3. Solicitation of grievances

In August 1995 after the commencement of the union campaign Titan Wheel International's CEO Mori Taylor and CCO Michael R. Samide arrived at the Clinton facility and spoke at several meetings of employees called by the Respondent. Dico Tire is a wholly owned subsidiary of Dyneer Corporation, which in turn is a wholly owned subsidiary of Titan Wheel International thus establishing their agency status on behalf of Dico. At these meetings Taylor and Samide assured the employees that the decision was the employees' as to whether they wanted union representation and Respondent would not take any action against them if they chose union representation. However, they did ask the employees to air their complaints and the employees did so and complained about a January 1995 reduction in vacation benefits for long-term employees, the personal leave policy, and about certain supervisors and overtime and profit sharing. Employee Joyce Hood testified that prior to the advent of the union campaign no member of management had ever inquired of her complaints. Following these meetings, the long-term employees' vacation benefits were reinstated, supervisors were discharged, an open-door policy was initiated, and Respondent reviewed its overtime and profit-sharing program. Samide sent the employees a letter answering the complaints raised by the employees at the meetings.

Analysis

With respect to the merits of this allegation, I find the General Counsel has presented ample evidence demonstrating that the concerns of employees had not been addressed by Respondent prior to the advent of the union campaign and that the solicitation of the employees' grievances by Respondent's officials contained the implicit promise that they would be remedied as borne out by the actions taken by Respondent shortly thereafter to remedy these grievances. I thus find that Respondent violated Section 8(a)(1) of the Act by soliciting employees' grievances during the union campaign. *Hertz Corp.*, 316 NLRB 672, 687 (1995).

C. 8(a)(3) Violations

1. Verbal warning issued to employee Weingardner

Weingardner testified that on September 29, 1995, he passed out union literature in the breakrooms during his two breaks. He was observed by Supervisor Robert Ridenour during the first break but Ridenour made no comment. While he was again passing out literature in the breakroom during his second break Superintendent Phillips entered the breakroom, picked up the literature, and sat with Supervisor Ridenour who was already in the breakroom. At the end of the break Weingardner returned to his work station and was approached by both Phillips and Ridenour shortly thereafter and Phillips said, "This is your warning for passing out literature on company property." Weingardner questioned Phillips as to whether there was anything in the employee handbook that prohibited the distribution of literature on company property and Phillips replied in the affirmative. Weingardner then agreed not to distribute literature on the premises and asked Phillips if literature could be distributed in the parking lot. Phillips replied that he did not know and left.

At the hearing Phillips testified that he had given Weingardner an "unofficial warning" for leaving literature at his work station. He also admitted warning Weingardner concerning leaving literature in the break areas. Phillips also contended that he had responded to Weingardner's question regarding distribution of literature on the parking lot by saying "its your affair." Ridenour did not address the break areas in his testimony but testified he remembered Phillips telling Weingardner not to leave union literature on his worktable and added that a fan was used to "keep the builders cooled down during the summer months," thus, indicating the concern was to prevent the literature from being blown over the work area. The General Counsel notes in her belief that this incident occurred in late September as opposed to the summer months. In his brief the Respondent's counsel contends that Weingardner had passed out the "union literature at the front of the break area" which Respondent contends, "was not within the break area but was outside of the front doors of the plant on plant property." Respondent also contends in its brief that the discipline was rescinded.

Analysis

I find Weingardner was issued a verbal warning by Phillips for passing out literature in the break areas which were nonwork areas during his nonworktime and that Respondent thereby violated Section 8(a)(3) and (1) of the Act. This constituted discipline for violation of an unlawful no-solicitation, no-distribution rule, which was being imposed only on union activities and was discriminatory enforcement of Respondent's facially valid rule. I credit Weingardner's version of these events over that of Phillips and Ridenour which I found unconvincing and geared toward changing the reason for the verbal warning from the distribution of literature in the breakroom to extend it to work areas outside the breakroom which I find to be unwarranted by the evidence and to the alleged concern about the volume of the literature in the breakroom and concerns about the storing of literature at Weingardner's workstation which, I also find, were not the real reasons for the issuance of the verbal warning. I also reject as unsupported by the evidence the Respondent's contention that the warning was rescinded. It was Respondent's burden to prove this contention and I find it failed to do so. See *Funk Mfg. Co.*, 301 NLRB 111, 111–112 (1992), with respect to oral warnings constituting discipline. *Wright Line*, 251 NLRB 1083 (1980); *Manno Electric*, 321 NLRB 278 (1996).

2. Verbal reprimand issued to employee Don Brown[2]

Employee Don Brown testified that on October 10, 1995, while he was on break, he distributed union literature in the breakroom and was observed by Supervisor Willie Booker who left and returned shortly thereafter with Plant Manager Ed Engels. Engels then picked up some of the literature and put it in his pocket while asking Brown if it was his. He then told Brown, he would not have "any of this in . . . the breakroom" in reference to the literature and told Brown this was a "verbal reprimand." This discipline has never been rescinded. Although Engels was present at the hearing, he was not called to testify. *Wright Line*, supra.

Analysis

I credit Brown's testimony which stands unrebutted on the record. I find Respondent violated Section 8(a)(3) and (1) of the Act by Engels' issuance of the verbal reprimand to Brown which was the direct result of Respondent's unlawful application of an overbroad rule against distribution of literature on

[2] Certain errors in the transcript are noted and corrected.

behalf of the Union. As the General Counsel contends, "any discipline resulting from an illegal no-soliciting/no-distribution rule is, by definition, a violation of Section 8(a)(3) of the Act." *Elston Electronics Corp.,* 292 NLRB 510, 511 (1989). Moreover, the discipline of Brown for engaging in protected union activity establishes a prima facie case of discrimination in violation of Section 8(a)(3) and (1) of the Act as Respondent's knowledge of Brown's union activities has been established as has Respondent's animus by the various other violations of Section 8(a)(1) in this case and the prima facie case was not rebutted by the Respondent as Engels did not testify *Wright Line*, supra.

3. Disparate treatment of employee Faye Rainey

With respect to the merits of this allegation the incident occurred on September 27, 1995, when tire-builder Faye Rainey a 20-year employee, was ordered to remove a white opaque plastic grocery bag of union literature from her machine by Personnel Manager Mark Bright who was accompanied by her supervisor, Ronnie Maples. Rainey, as did other employees, testified she regularly hung her personal belongings from her machine without incident. Bright and Maples testified to the contrary and that the bag was hanging off of the disconnect power on/off switch of her machine which constituted a fire hazard as the box contained various circuit breakers which would arch but were contained by a metal box. Maintenance mechanic Kyle Mitchell acknowledged this but contended this did not constitute a safety hazard. Coincidental in time with this incident the Respondent elicited testimony from Superintendent Phillips, that there had been a number of items of union literature posted on a bulletin board near Rainey's workstation that it was suspected that Rainey had been involved in this which Rainey denied at the hearing but Respondent presented no evidence that she had in fact posted the union literature.

Bright's order to Rainey was to remove it to her locker, a 2- to 3-minute walk away, where Respondent contends she could have retrieved it to take out during her break for handing out in the breakroom or to store it in her automobile.

Analysis

The General Counsel asserts that Rainey was required to remove the bag from her workstation because it contained union literature and that Respondent violated Section 8(a)(3) and (1) of the Act by requiring her to remove the literature whereas other employees were routinely permitted to maintain nonunion personal belongings at their workstations, as this constituted a discriminatory change in her terms and conditions of employment, thus, establishing a prima facie case of discrimination. The General Counsel further asserts that the Respondent's alleged safety concern was not the real reason for the removal of the bag but that Respondent's concern about the posting of union literature was the real motivation for its action.

I find as contended by the General Counsel that Respondent did violate Section 8(a)(3) and (1) of the Act by its discrimination against Rainey by requiring her to remove the bag containing union literature from her machine. I am convinced and credit Rainey and others including Mitchell that employees regularly hung personal belongings from their machines. While this may not be the safest practice I do not believe that Respondent was motivated by safety concerns here. Rather, I am convinced Respondent's supervisors were aware that Rainey had a bag of union literature and that union literature had been posted on a nearby bulletin board. This is what was brought to Bright's attention and why he initiated this incident with Rainey. Thus the action taken against Rainey was motivated by Respondent's desire to stem the union campaign and prevent the dissemination of union literature by removing it from the workplace. I find Respondent's asserted reason for ordering Rainey to remove the literature from her machine to be pretextual and that Respondent has failed to rebutt the prima facie case of discrimination established by the General Counsel to stem the union campaign and prevent the dissemination of union literature by removing it. *Wright Line*, supra.

4. The suspension of Kyle Mitchell

Kyle Mitchell was employed by Respondent as an electrical mechanic. He was a 9-year employee and had no prior disciplinary record except a warning for solicitation on behalf of the Union in August 1995, presumably issued for an alleged violation of Respondent's written no-solicitation/no-distribution rule which rule is facially valid but was disparately enforced during the union campaign against union supporters while ignored regarding solicitation and distribution carried on during work times and in work areas in the plant by both unit employees and supervisors (i.e., the sale of Girl Scout cookies and the wagering on sports events through the use of a "ball board" circulated among employees and participated in by supervisors). This prior warning was not the subject of a charge and complaint allegation in this case.

Mitchell was the undisputed leading advocate on behalf of the Union in the election campaign. In his position as an electrical mechanic he had free access throughout the plant as he was required to perform work on the machines utilized in the production of tires. According to the testimony of three employees employed as tire builders, Mitchell regularly approached them on most days they worked (Respondent operates on 12-hour shifts and some employees may only work two or three 12-hour shifts per week). Mitchell is a large man, 6 foot 3 inches in height and of a stocky build. The three tire builders were all small in physical stature and build. They testified and gave substantially the same account of Mitchell's almost daily approach to each of them reminding them of an upcoming union meeting and subsequent inquiry of them as to why they had not attended a recent meeting in an intimidating manner interfering with their production by putting himself between them and their machines, going from one employee to another although he had not been called to work on their machines. Tire builder Wilson Marsh Jr. testified that in August 1995, Mitchell solicited him to sign a union card while Marsh was working and Marsh refused and reported this to his supervisor, which was apparently the reason for the issuance of the August 1995 warning to Mitchell. Tire builder James Huddleston testified that during August or September 1995, Mitchell came to his machine each day he worked (Huddleston worked only 2 to 3 days a week as he is a minister and attends to church matters on the weekends). Huddleston reported this to his supervisor, Julia Freels and told her he "was having a problem with Kyle (Mitchell) coming to my machine constantly, harassing me about the union meetings . . . you could set your clock by him. . . . You always had to come up with an excuse why you wasn't there. . . . I just got tired of doing that, day after day. I just got tired of it. Sick of it." Mitchell would come up to only a foot away from him as he was questioning him regarding his nonattendance of the union meetings.

Tire builder Marshall Nelson testified that during September 1995 Mitchell approached him virtually every day while he was

working and inquired if he was going to the upcoming union meetings and the day after asking why he had not attended. Mitchell made a circuit of going by each tire builder one by one. He would get within 9 inches of Nelson's face. "When he come up to you, he would just get right on to you to where you couldn't work, or anything." He put himself between Nelson and his machine interfering with his work. He testified that Mitchell "has got a big belly," and used it to "just nudging you out of the way."

Tire builder Mike Kitts testified that in the fall of 1995, Mitchell approached him every day while Kitts was working at his machine and solicited him to sign a union authorization card until he did so and thereafter Mitchell pestered him to attend union meetings and "it would hold up my production to the manner where I couldn't build. I couldn't work. He would be so close. At times, I would have to just, you know, push him away" "I just got real aggravated with him . . . I smarted off one time to him to get out of my face, and from then on when I would see him coming, I would always like go to the bathroom, or go behind my machine." Kitts testified that on these occasions he had not paged maintenance.

Huddleston, Nelson, and Kitts reported Mitchell's conduct to their supervisor, Julia Freels, who reported it to Tire Room Superintendent Terry Phillips and Human Relations Manager Mark Bright. Phillips, Freels, and Bright met with the three employees who signed statements concerning these incidents. Bright telephoned Corporate Director of Human Resources Hank Washington and apprised him of these incidents. Bright and Maintenance Department Superintendent Jack Ready met with Mitchell and advised him of these complaints and that he was intimidating other employees. Mitchell denied this and asked to meet his accusers. Bright declined this request and placed Mitchell on immediate suspension pending the outcome of Respondent's investigation and ordered Mitchell not to discuss the matter with anyone. One of Respondent's parent Titan's corporate attorneys Cheri Holley met with employees Nelson and Kitts and subsequently with Mitchell who admitted having been at the employees' machines while they were working and contended he had a right to do so. Holley asked Mitchell whether he should have been performing electrical work on these occasions and he responded that he often did not have any work to perform. Holley then told Mitchell that since he did not deny the "harassment" that he was going to be suspended for the 2-week period of time he was already off and he was returning to work at his next scheduled shift. Holley did not inform Mitchell of who had accused him of the harassment and required him to read a memorandum she had prepared which again admonished Mitchell not to discuss these matters as a condition of resolving the matter by the issuance of the suspension.

The General Counsel argues that the employees' typed statements did not refer to any misconduct other than mere solicitation. I note that each statement states that Mitchell has harassed them either to sign a union card or to attend a union meeting. The General Counsel notes in her brief that the disciplinary suspension notice states that Mitchell "engaged in harassment and interference with coworkers . . . in an attempt to solicit during working time . . . in violation of the no-solicitation provision of the company's work rule," and had "unwelcome contacts."

Huddleston's written statement given to Respondent states, "Kyle Mitchell constantly comes to my machine to ask why I did not attend a recent Union meeting. In the beginning I was harassed on a regular basis to sign a Union card."

Analysis

I find the General Counsel has established a prima facie case of discrimination against Mitchell in violation of Section 8(a)(3) and (1) of the Act by reason of Respondent's suspension of Mitchell. Thus it is undisputed that Mitchell was the leading union advocate among the employees at the plant and that Respondent had knowledge of this. Respondent's animus toward the Union and its efforts to unlawfully stem the union campaign are well documented as established by the other violations found in this decision. The suspension of Mitchell for harassment of Respondent's employees is inextricably intertwined with its disparate enforcement of its facially valid no-solicitation rule against union activities and advocates. Respondent's refusal to permit Mitchell to confront his accusers is evidence giving rise to an inference that Respondent was motivated by an unlawful purpose in suspending Mitchell. Furthermore, its admonishment to Mitchell that he not disclose or discuss either the pending investigation of the matter by Respondent while Mitchell was suspended or the ultimate suspension of Mitchell by Respondent with others was violative of Section 8(a)(1) of the Act as it effectively precluded Mitchell from exercising his Section 7 rights to engage in concerted activities with his fellow employees concerning his wages, hours, and other terms and conditions of employment, and also precluded him from having access to the Board concerning possible violations of the Act.

However, a review of the testimony presented by Respondent concerning the manner in which Mitchell solicited his fellow employees while they were working convinces me that he engaged in harassment and intimidation of these three employees which routinely and substantially interfered with their production during their work time at their machines in the process of building tires. The General Counsel characterized Mitchell as a large jovial man who was merely friendly and reminding them of union meetings. However, I was convinced by the sincerity and concern of the three tire builders who testified concerning Mitchell's regular daily visits to them and their fellow employees in the tire production department, that he was engaging in intimidation of these employees in his efforts on behalf of the Union and did harass them whether intentionally or unwittingly and interfered with their production. I am thus convinced that Respondent would have suspended him even in the absence of any unlawful motivation. While it is undisputed that Respondent's facially valid no-solicitation rule was routinely ignored by Respondent and its supervisors as there was ongoing sale of merchandise (i.e., Girl Scout cookies) and betting on sports events occurring (i.e., the ball board), I am convinced that if any of these activities had been conducted in the same manner as Mitchell operated in this case, discipline would have been taken against the employee engaging in such activities. I will thus recommend the dismissal of this allegation. *Wright Line*, supra; *Manno Electric,* supra; see also *MTD Products*, 310 NLRB 733 (1993), in which the Board held that although the Respondent relied on an invalid rule against solicitation and distribution, as one reason for a discharge in that case, "this finding does not affect our decision to affirm the judge's conclusion that Respondent did not violate Section 8(a)(3) of the Act. . . . The Respondent has met its burden of proving that it would have discharged [the employee] even in the absence of the unlawful rule and of her union activities."

5. The discharge of Charles Long

Charles Long, a known union supporter and a 6-year employee of Respondent who worked as a tire builder was discharged by Respondent on October 2, 1995. Long testified that he was normally assigned to a model 11 tire building machine which he had chosen through a polling selection process as the size of the machine was compatible with his height of 6 feet 1 inch. He testified that he did not like to work on model 14 tire machines as they were lower and required him to stoop down causing him back problems. Several witnesses were questioned regarding the differences between the two machines and testified that they were frequently rotated from one machine to another when their supply of material or backlog of tires built necessitated an increase in production of one type of tire as well as for repairs to their machines or for training purposes. Most of the witnesses indicated that they had no problem working on either type of machine. However, Mark Winegardner corroborated Long's testimony that the model 11 machines, such as the one regularly assigned to Long, were more compatible for a tall person than were the model 14's. Long testified he had previously told Maples that the model 14 tire machine caused him back problems and that he had asked Maples not to assign him to this machine. Maples denied this but admitted that he had observed Long wearing a back brace. Long had previously been instructed not to solicit on behalf of the Union on company property. At the start of his shift on September 28, 1995, Long was met by Scott Caldwell another model 11 tire builder who opposed the Union in the campaign and who laughed and informed Long that Long was not going to like it as he had been assigned to Long's machine for the day. On learning this Long went to the office of his supervisor, Ronnie Maples, who was meeting with some other employees and inquired as to why he had been moved from his model 11 machine and was told by Maples that he needed more production on that machine, thus insinuating that Long's production was substandard. At the hearing the Respondent presented production records indicating that Long's production was 70 percent of standard whereas Caldwell's production was 90 percent of standard. However, these records do not indicate the type of tires being made by the employees or quality of the tires. It is acknowledged that production rates will vary depending on what type of tire is being made. It is also undisputed that Long had never received any discipline for poor production following his becoming a permanent employee in 1990. On hearing Maple's response disparaging his production, Long stated, "so that's the game" and exited the office. Long testified he then went to the model 14 machine and felt nauseous. He saw Leadman Mike Hohlman and told him he was sick and was going home. Hohlman told him he had better check with Maples, Long's supervisor. It is undisputed that leadmen do not have the authority to permit employees to leave early. Long left and reported to work at his next regularly scheduled shift 2 days later. On his return to work he observed that his timecard was missing and paged Maples. He was then met by Terry Phillips who was a friend of his and who directed him to a meeting held in the personnel office with Bright, Maples, and Phillips, where he was presented with a document designating him as an "early quit." Long disagreed that he had quit and told them that he would contact his attorney. Respondent has since treated him as an "early quit" and has refused to reinstate him. He was walked out of the plant by Phillips who testified Long had told him at that time that he had not told Maples he was leaving because he was afraid there would be a confrontation. Long denied having said this.

The General Counsel contends that the animus of the Respondent toward the Union and its supporters has been established as has Respondent's knowledge of Long's union activities as evidenced by the discussion of Maples with Long and Cox that they could not solicit on behalf of the Union on company property, and that the action taken against Long by terminating him establishes a case of unlawful discrimination in violation of Section 8(a)(3) and (1) of the Act. The General Counsel further contends that the Respondent has failed to rebutt its case by the preponderance of the evidence and points to other instances wherein employees left early and were not terminated.

The Respondent contends that the termination of Long was consistent with its policy of treating employees who leave the job as "early quits" and refusing to reinstate them. It points particularly to the termination of Scott Carlos Johnson who was terminated and not reinstated for leaving during a shift without telling anyone. It distinguishes the case of another employee who was not terminated for leaving while working overtime without permission as he had completed his regular shift and the case of another employee who was on light duty and left early without permission.

Analysis

I find that the General Counsel has established that the Respondent's knowledge of Long as a union supporter and its animus against the Union and its supporters was a substantial motivating factor in Maples' reassignment of Long to another machine and his disparagement of Long's productivity and in the Respondent's decision to terminate Long. I further find that Respondent has failed to rebutt this case by the preponderance of the evidence. I find Respondent has failed to demonstrate any valid reason for switching Caldwell from his model 11 machine to Long's model 11 machine and for switching Long to a model 14 machine. Obviously if increased production had been the real reason, the tires in question could have been built on Caldwell's model 11 machine instead of Long's machine. I find that Maple's reassignment of Long to another machine and his disparaging remark to Long regarding his productivity were subtle actions calculated to harass Long because of his union support. While Long's actions in leaving without telling Maples directly may not have been in his best self-interest, I find the Respondent seized on this incident to discharge Long and rid itself of a union supporter. I credit Long's assertion that he was sick as the result of his treatment by Maples. Obviously he was upset and angered by this treatment and I find no basis for discrediting his testimony in this regard. Although admittedly his leadman did not have the authority to grant him permission to leave, he did not leave without telling anyone as had Scott Carlos Johnson and Long did report for work on his next scheduled shift. The other cases cited by the parties are only of arguable persuasion and not identical to the instant case. I find that Respondent seized on this incident in this case to rid itself of a union supporter who previously had an unblemished record as an employee of Respondent. I thus find that Respondent violated Section 8(a)(1) and (3) of the Act by its discharge of Charles Long. *Wright Line*, supra; *Manno Electric Inc.*, supra

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by its interrogation of employees Charles Long and Charles Cox engaged in by Supervisor Ronnie Maples concerning whether they had been discussing the Union and by Maple's unlawful restriction of the employees from discussing the Union on company property which constituted the application of an unlawfully broad no-solicitation rule.

4. Respondent violated section 8(a)(1) of the Act by its restriction imposed by its supervisor, Gary Walker, on its employee David Courtney from passing out union literature in the main break area, a nonwork area while Courtney was on lunch, a nonwork time.

5. Respondent violated Section 8(a)(1) of the Act by the restrictions imposed by its Personnel Manager Mark Bright and its Corporate Director of Human Resources Henry Washington by prohibiting employees from distributing union literature in its parking lot, a nonwork area while the employees were on nonwork time and by denying access to an easement immediately adjacent to its property for the distribution of the literature.

6. Respondent violated Section 8(a)(1) of the Act by disparately enforcing its facially valid no-solicitation, no-distribution rule by enforcing the rule only against union solicitation and distribution while permitting other solicitation and distribution activities during worktime and in work areas.

7. Respondent violated Section 8(a)(1) of the Act by interrogation of its employees Mark Winegardner and Chris White by Tire Room Superintendent Terry Phillips concerning whether they knew the identity of employees who were soliciting union authorization cards and by coercively stating that he wished they (Respondent's management) knew who was "pushing the Union," which constituted an unlawful implied threat of retaliation and by unlawfully threatening Winegardner and White that Respondent would reduce wages and subcontract existing unit jobs if the Union were successful in its organizational drive.

8. Respondent violated Section 8(a)(1) of the Act by Superintendent Terry Phillips' threat issued to employee Dennis Snyder that if the Union won the election, the employees would lose jobs and benefits.

9. Respondent violated Section 8(a)(1) of the Act by the threat issued by its maintenance supervisor, Larry Pitts, to employees Hershel Sanders and Donny Sexton that if the Union won the election the maintenance work would be contracted out.

10. Respondent violated Section 8(a)(1) of the Act by the solicitation of grievances from unit employees engaged in by CEO Mori Taylor and CCO Michael R. Samide from unit employees with the implicit promise to remedy the grievances in order to defeat the union organizational campaign.

11. Respondent violated Section 8(a)(3) and (1) of the Act by the warning issued to employee Mark Winegardner by Superintendent Terry Phillips for distributing union literature in the breakroom, a nonwork area during his nonworktime.

12. Respondent violated Section 8(a)(3) and (1) of the Act by the verbal warning issued to employee Don Brown by Plant Manager Ed Engels for distributing union literature in the breakroom a nonwork area during his nonworktime which was precipitated by Respondent's unlawful enforcement of its over broad no-solicitation, no-distribution rules.

13. Respondent violated Section 8(a)(3) and (1) of the Act by its disparate treatment of employee Faye Rainey by refusing to permit her to maintain union literature at her workstation while permitting other employees to keep personal items at their workstations.

14. Respondent did not violate the Act by its suspension of employee Kyle Mitchell.

15. Respondent violated Section 8(a)(1) of the Act by prohibiting Mitchell from discussing his suspension which was an unlawful prohibition to Mitchell of discussing his terms and conditions of employment in violation of his rights under Section 7 of the Act and by requiring him to waive his statutory right to Board access.

16. Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of employee Charles Long.

17. Respondent violated Section 8(a)(1) of the Act by applying its no-solicitation, no-distribution rule in an overbroad and discriminatory manner.

18. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notice.

It is recommended that Respondent rescind the unlawful warnings issued to employees Mark Weingardner and Don Brown and the unlawful discharge of employee Charles Long and offer Long immediate reinstatement to his former position or to a substantially equivalent position, if his former position no longer exists, and that Respondent make Long whole for all loss of backpay and benefits sustained as a result of the discrimination against him by Respondent in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

The Election

The petition in Case 10–RC–14650 was filed on September 6, 1995. Thereafter, pursuant to a Stipulated Election Agreement, an election by secret ballot was conducted on October 17 and 18, 1995, among the employees in the stipulated appropriate unit to determine the question concerning representation. The appropriate unit is:

> All production and maintenance employees employed by the Employer at its Clinton, Tennessee facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

There were approximately 461 eligible voters of whom 172 cast valid votes for and 241 cast valid votes against the Petitioner, United Steelworkers of America. There were 29 challenged ballots and one void ballot. The challenged ballots were insufficient to affect the results of the election. On October 24, 1995, the Petitioner, timely filed objections to the election. Pursuant to the Order of the Regional Director for Region 10 of

[3] Interest shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

the National Labor Relations Board dated February 2, 1996, Case 10–RC–14650 was consolidated with Case 10–CA–28843 for hearing before an administrative law judge. Seven objections were filed by the Petitioner and on December 15, 1995, the Petitioner requested the Regional Director to withdraw Objections 1, 2, 4, and 6, and which request was approved, leaving Objections 3 and 5 for hearing, ruling and decision by an administrative law judge.

Objection 3: This objection alleges that employee Donald Brown was told he could not distribute union campaign literature in the break area on nonworking time and was given a verbal warning for doing so. This objection is coextensive with paragraph 12 of the complaint in which the Employer was alleged to have violated Section 8(a)(3) and (1) of the Act by issuing a verbal warning to Don Brown and which violation I have found as alleged above in this Decision and I accordingly conclude that the Respondent did in fact issue employee Don Brown a verbal warning and deterred him from distributing union campaign literature in the break area during nonworking time. This violation occurred during the critical period prior to the election, and I find had the tendency to and did thereby interfere with the election and I sustain the objection.

Objection 5: This objection alleges that maintenance employees were told that if the Union was selected by the employees, that an outside contractor would do the maintenance work. This objection is coextensive with paragraph 9 of the complaint and with other incidents developed at the hearing wherein I found that the Employer's supervisors made these threats during the critical period and I find that these threats were inherently coercive and interfered with the election and I sustain Objection 5 to the election also.

It is recommended that the election held on October 17 and 18, 1995, be set aside and Case 10–RC–14650 be referred to the Regional Director for the setting of a new election at such time and place as he determines once the unfair labor practices have been remedied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Dico Tire, Inc., Clinton, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities and sympathies and the union activities and sympathies of their fellow employees.

(b) Threatening employees with subcontracting of unit work, loss of jobs, reduction in pay and loss of benefits, if they select the Union as their collective bargaining representative.

(c) Disparately enforcing a facially valid no-solicitation, no-distribution rule against solicitation or distribution on behalf of the Union.

(d) Promulgating an overbroad rule against solicitation and distribution in nonwork areas during nonwork time.

(e) Denying employees access to its property by prohibiting them from distributing union literature on its property in nonwork areas and on a public easement adjacent to its property.

(f) Issuing warnings to its employees for engagement in lawful solicitation on behalf of the Union and distribution of union literature in nonwork areas of its premises during nonwork time of the employees.

(g) Prohibiting its employees from discussing discipline imposed on them with others, thus restraining them from discussing their terms and conditions of employment with their fellow employees and others in violation of their rights under Section 7 of the Act and thus also denying the employees their statutory right to Board access.

(h) Discharging its employees for engaging in union activities.

(i) Soliciting grievances from unit employees with an implicit promise to remedy them in order to defeat a union organizational campaign.

(j) Disparately prohibiting its employees from maintaining personal items, including union campaign literature, at their workstation.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unlawfully promulgated overbroad no-distribution, no-solicitation rule and inform the employees in writing that this has been done.

(b) Within 14 days from the date of this Order, rescind the unlawful warnings issued to Mark Weingardner and Don Brown, the unlawful restriction on employee Faye Rainey's maintenance of personal items at her work station and the unlawful prohibition issued to employee Kyle Mitchell not to discuss his suspension with others, and rescind the unlawful discharge of employee Charles Long and offer reinstatement to Long to his former position, or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Long whole for all loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section.

(d) Within 14 days from the date of this Order, remove from its files any reference to the foregoing unlawful discrimination against its employees and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Clinton, Tennessee, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1995.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

With respect to the alleged unlawful suspension of employee Kyle Mitchell, the complaint is dismissed.

IT IS FURTHER ORDERED that the election in Case 10–RC–14650 be set aside and this case be transferred to the Regional Director for Region 10 for the setting of a new election at a time and place to be determined by him.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees concerning their union activities and sympathies and the union activities and sympathies of their fellow employees.

WE WILL NOT threaten employees with subcontracting of work, loss of jobs, reduction in pay, and loss of benefits if they select the United Steelworkers as their collective-bargaining representative.

WE WILL NOT issue warnings to our employees for engaging in solicitation on behalf of the Union and distributing union literature during nonworktime in nonwork areas of our premises.

WE WILL NOT disparately enforce our no-solicitation, no-distribution rule against union activities or deny employees access to our property or public easements adjacent thereto distribute union literature on behalf of a union.

WE WILL NOT promulgate an overbroad no-solicitation, no-distribution rule prohibiting solicitation and distribution of union literature in nonwork areas during nonworktime.

WE WILL NOT issue warnings to our employees or suspend and discharge employees because of their engagement in union activities.

WE WILL NOT disparately prohibit employees from maintaining personal items including union literature at their work stations while permitting other employees to maintain personal items at their work stations.

WE WILL NOT prohibit our employees from discussing disciplinary actions with others.

WE WILL NOT solicit grievances with the implicit promise of remedying them in order to stem a union campaign.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, rescind the warnings issued to employees Mark Weingardner and Don Brown; and the prohibition against employee Kyle Mitchell of discussing his suspension; the discharge of employee Charles Long; and the prohibition issued to employee Faye Rainey against maintaining personal items at her work station.

WE WILL, within 14 days from the date of this Order, offer reinstatement to Charles Long to his former position or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Charles Long whole for any loss of earnings and other benefits resulting from the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discipline issued to employees Mark Weingardner, Don Brown, and Charles Long, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful discrimination will not be used against them in any manner.

DICO TIRE, INC.